A

## UNP PLYWOOD SDN BHD

**v.**

## SABAH FOREST INDUSTRIES SDN BHD

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
SULONG MATJERAIE J
[SUIT NO: K22-55-1997]
23 FEBRUARY 2007

C ***CONTRACT:*** *Illegality - Assignment of rights in a licence for timber extraction - Whether illegal - Severability - Consideration - Whether whole transaction tainted with illegality - Whether s. 66 Contracts Act 1950 applicable - Forest Enactment 1968 (Sabah), s. 24(6) - Contracts Act 1950, ss. 24, 25, 66*

D ***TRADE AND INDUSTRY:*** *Forestry - Licence to take timber - Assignment of rights - Whether illegal - Severability - Consideration - Whether whole transaction tainted with illegality - Whether s. 66 Contracts Act 1950 applicable - Forest Enactment 1968 (Sabah), s. 24(6) - Contracts Act 1950, ss. 24, 25, 66*

E

The defendant, holder of a Special Timber Licence No. SK7/90 ('said licence') issued by the Sabah Forestry Department for and on behalf of the State Government to fell, convert and extract timber from within a timber concession area of approximately F 258,584 hectares of timber land ('said area'), and the plaintiff, the contractor to fell and to purchase the extracted timber from the said area, had entered into two agreements for the extraction and purchasing of timber. The first agreement allowed the plaintiff to extract commercial timber logs from 2,825 hectares of the said G area and to purchase commercial timber logs therefrom while the second agreement permitted the plaintiff the same from 8,477 hectares of the said area. By two irrevocable Powers of Attorney ('said POA'), the defendant appointed the plaintiff as its attorney to, *inter alia,* manage the extraction and sale of timber therefrom, H to enter into contracts and arrangements of all kinds in relation thereto and to generally exercise the powers granted therein. The defendant subsequently repudiated the first and second agreements and revoked the said POA on the ground that the State Authorities had informed the defendant that both agreements I and the said POA had contravened s. 24(6) of the Forest Enactment 1968 (Sabah) ('Enactment'), and were thereby rendered illegal and of no legal effect. As a result of the

defendant's repudiation thereof, the plaintiff suffered loss and brought this claim for, *inter alia*, damages against the defendant. The parties agreed that three issues required determination: (i) whether the two agreements and the said POA ('impugned transactions') were *void ab initio* on the grounds of illegality; (ii) if the impugned transactions were valid, whether the termination by the defendant was wrongful and invalid; and (iii) if the impugned transactions were *void ab initio*, whether s. 66 of the Contracts Act 1950 ('Act') applied in the plaintiff's favour. The plaintiff, although conceding that the extraction portion of the two agreements and the said POA was illegal, contended that the sale part of the agreements was not tainted with illegality and that, thus, there could be severance as there were two distinct acts. With regards to s. 66 of the Act, the plaintiff submitted that it prevented the defendant from 'running away' from its responsibility and it conferred upon the court the discretion to grant a remedy in the nature of restitution within the ambit of the section and within the principles of the law of contract.

**Held (dismissing the plaintiff's claim):**

**(1)** The law is clear that where the consideration for a promise or promises contained in a contract is unlawful, the whole agreement is void. The reason is that it is impossible to discriminate between the weight to be given to different parts of the consideration. In the instant case, the consideration was for the extraction and the purchase of logs, and since the sale portion of the first and second agreements was tainted by the illegal extraction portion of the agreement, the whole transaction was tainted with illegality. (paras 52, 53 & 54)

**(2)** The said POA was irrevocable and, read together with the first and second agreements, effectively assigned the rights of the defendant under the said licence to the plaintiff. The extraction and sale of the timber within the concession areas of the defendant were inextricably linked and could not be detached from each other. There was nothing for the plaintiff to purchase from the defendant if the plaintiff did not extract the timber first from the said area. Thus, the extraction and the sale were part and parcel of the same transaction. Clause 1(a) of the first and second agreements on its true construction contemplated a composite act and not two distinct separate acts. It envisaged reciprocal obligations to be performed, one to extract, which was to be done exclusively

by the plaintiff, and the other, which was the passive act for the defendant, to sell the logs to the plaintiff after the extraction of timber had been performed by the plaintiff. Therefore, the plaintiff's argument that the extraction part and the purchase part were two separate transactions could not be accepted. Based on the above, the 'sale' part was not severable from the 'extraction' part of the first and second agreements. The end result was that the defendant had effectively transferred its rights in the licence to the plaintiff. Indeed, the first and second agreements and the said POA read together amounted to an attempt to circumvent the conditions of the issuance of the licence as to its non-transferability in any manner whatsoever to the plaintiff, who was a non-licensee. Clearly, that was illegal and contrary to s. 24(6) of the Enactment. (paras 80 & 81)

**(3)** Regarding the three issues requiring determination, the impugned transactions were *void ab initio* on the grounds of illegality and, thus, the issue of their termination by the defendant was a non-issue. Section 66 of the Act also did not apply in the instant case. The plaintiff had therefore failed, on the balance of probability, to make out a case against the defendant. (paras 82, 83, 84, 85 & 86)

**Case(s) referred to:**

*Ahmad Udoh & Anor v. Ng Aik Chong [1970] 1 MLJ 82* ***(refd)***

*Apex Pharmacy Holdings Sdn Bhd v. Chee Chin [1984] 2 CLJ 266; [1984] 1 CLJ (Rep) 67 FC* ***(refd)***

*Asia Television Ltd & Anor v. Viwa Video Sdn Bhd & Connected Cases [1984] 2 CLJ 80; [1984] 1 CLJ (Rep) 72 FC* ***(refd)***

*Attwood v. Lament [1920] 3 KB 571* ***(refd)***

*Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC* ***(refd)***

*Bennett v. Bennett [1952] 1 All ER 413* ***(refd)***

*Carney v. Herbert [1985] 1 All ER 438* ***(refd)***

*Chin Yin Foh v. Superwood Sawmill (S) Sdn Bhd [1999] 1 LNS 15* ***(refd)***

*Chu Yin Foh v. Superwood Sawmill (S) Sdn. Bhd [1999] 1 LNS 15* ***(refd)***

*Cynsan Development Sdn Bhd v. Majunis Tumpi & Ors [1997] 3 CLJ 396 HC* ***(refd)***

*Fielding and Plan Ltd v. Najjar [1969] 2 All ER 150* ***(refd)***

*Fusing Construction Sdn Bhd v. EON Finance Bhd [2000] 3 CLJ 341 CA* ***(refd)***

*Kilang Papan Kuala Kangsar v. Koperasi Serbaguna Bekas-Bekas Polis Perak Bhd [1995] 3 CLJ 697 HC* ***(refd)***

*Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC* ***(refd)***
*Lo Su Tsoon Timber Depot v. Southern Estate Sdn Bhd [1971] 2 MLJ 161* ***(refd)***
*Lori (M) Bhd v. Arab-Malaysia Finance Bhd [1999] 2 CLJ 997 FC* ***(refd)***
*Menaka v. Lum Kum Chun [1977] 1 MLJ 91* ***(refd)***
*Murugesan v. Krishnasamy & Anor [1958] 24 MLJ 92* ***(refd)***
*Mustafa Osman v. Lee Chua & Anor [1996] 3 CLJ 494 CA* ***(refd)***
*Ng Siew San v. Menaka [1973] 2 MLJ 154* ***(refd)***
*Pickering and Another v. The Ilfracombe Railway Co LR 3 CP 235* ***(refd)***
*Putsman v. Taylor [1927] 1 KB 637* ***(refd)***
*Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC* ***(refd)***
*Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21* ***(refd)***
*Sundang Timber Co Sdn Bhd v. Kinabatangan Development Co Sdn Bhd [1977] 2 MLJ 200* ***(refd)***
*Tan Lai v. Mohamed Mahmud & Ors [1982] CLJ 201; [1982] CLJ (Rep) 800 HC* ***(refd)***
*Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA* ***(refd)***
*The Bank of Australasia v. Thomas Chaplin Breillat 6 Moore PC 152* ***(refd)***
*Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229* ***(refd)***
*Wong Yoon Chai v. Lee Ah Chin [1981] 1 MLJ 219* ***(refd)***
*Yeep Mooi v. Chu Chin Hua & Ors [1981] 1 MLJ 14* ***(refd)***

**Legislation referred to:**
Contracts Act 1950, ss. 24(a), (b), (e), 25, 58, 66
Forest Enactment 1968 (Sabah), s. 24(6)

**Other source(s) referred to:**
*Chitty On Contracts,* 27th edn, vol 1, p 882
*Pollock & Mulla On Indian Contract And Specific Relief Acts,* 11th edn, pp 389-390

*For the plaintiff - Natasha Isabelle S Balakrishnan; M/s Sugumar & Co*
*For the defendant - Norbert Yapp Chu Chon; M/s Jayasuriya Kah & Co*

*Reported by Suresh Nathan*

## JUDGMENT

**Sulong Matjeraie J:**

**Ruling**

**[1]** The defendant was a holder of a Special Timber Licence No. SK7/90 ('the said licence') issued by the Sabah Forestry Department for and on behalf of the State Government to fell,

convert and extract timber from within a timber concession area of approximately 258,584 hectares of timber land situated in the districts of Sipitang, Beaufort and Tenom in the State of Sabah ('the said area'). The said licence was for a period of five years expiring on 15 October 1995.

**[2]** The plaintiff was the contractor to fell and to purchase the extracted timber from the said area.

**[3]** Two agreements for the extraction and purchasing of timber were signed between the plaintiff and defendant. One was dated 28 June 1993 ('the first agreement') and the second agreement was dated 13 August 1993 ('the second agreement'). Where appropriate the first agreement and the second agreement shall jointly be referred to as 'the first and second agreements'.

**[4]** The first agreement allows the plaintiff to extract commercial timber logs from 2,825 hectares of the said area and to purchase commercial timber logs therefrom while the second agreement permits the plaintiff to extract commercial timber logs from 8,477 hectares of the said area and to purchase timber logs therefrom in accordance with the terms and conditions stated therein. The total area of 11,302 hectares shall be referred to as 'the said portion of the said area'.

**[5]** By two irrevocable power of attorney dated 4 August 1993 and 22 September 1993 ('the said power of attorney') the defendant appointed the plaintiff as their attorney to, *inter alia*, "manage and superintendent the extraction and sale of timber therefrom and to enter into contracts and arrangements of all kinds in relations thereto and to generally exercise the powers granted therein and which shall be irrevocable for the period of the validity of the first and second agreements respectively. I shall come back to other terms of the power of attorney in the later part of this ruling.

**[6]** At the time of the execution of the first and second agreements, the plaintiff claims that the portion of the said land had a total volume of approximately 1,243,220 cubic meters of merchantable timber logs.

**[7]** Under cl. 27 of the first agreement and cl. 25 of the second agreement, the defendant may terminate the first and second agreements:

(i) upon the continuous occurrence of the events referred to in cl. 26 of the first agreement and cl. 24 of the second agreement for a period of 14 days, the defendant may terminate the first and or second agreements by giving six months written notice to the plaintiff;

(ii) in the event that the plaintiff commits any breach of the terms and conditions of the first and second agreements, the defendant may terminate the first and second agreements forthwith; and

(iii) upon the extraction and exhaustion of all merchantable timber logs from the said portion of the said area.

**[8]** Although the defendant admitted to having entered into the two agreements and the granting of two deeds of the power of attorney to the plaintiff but argued that these were entered into by their previous management. As such the defendant through their solicitors' letter dated 22 August 1994 repudiated the first and second agreements and revoked the said power of attorney on the grounds that the State Authorities had informed the defendant both agreements and the said power of attorney had contravened s. 24(6) of the Forests Enactment 1968 and were thereby rendered illegal and of no legal effect.

**[9]** To this the plaintiff contended that even if the first and second agreements are illegal (which obviously was denied) as alleged by the defendant, the plaintiff is not in *pari delicto* in that the plaintiff is the innocent party and not influenced by a guilty intention and would rely, if necessary, on s. 66 of the Contracts Act. It was the defendant, the plaintiff alleged, who had expressly and clearly agreed to do the alleged illegal acts with illegal intention and that the plaintiff was the innocent party at all times.

**[10]** In the midst of the trial, learned counsel for the plaintiff concedes (rightly so, I think) that the extraction portion of the both agreements is illegal. He applied for and after hearing arguments from both counsel, leave was granted by this court to allow the insertion of new paras 7, 8 and 9 to the plaintiff's amended reply and defence to counterclaim.

**[11]** Paragraph 7 argued that the first and second agreements comprised of 2 separate agreements, namely an agreement to extract commercial timber logs and an agreement to sell and purchase commercial timber logs. The plaintiff argued that to sell

and purchase commercial timber logs is not a prohibited transaction under s. 24(6) of the Forest Enactment 1968 and further argued that repudiation of the first and second agreements by the defendant was wrongful.

**[12]** The plaintiff argued that at the time of execution of the first and second agreements as well as the said power of attorney, the defendant's Board of Directors comprised of, *inter alia*, the director of Sabah Forestry Department Datuk Miller Munang, the then Sabah State Secretary Datuk (as he then was) Simon Sipaun, the defendant's in house legal adviser cum Company Secretary Ms. Irene Kong. The defendant's Board of Directors had further resolved for the defendant to enter into the first agreement, the second agreement and the grant of the said power of attorney. Both agreements were prepared by the same firm of solicitors who were the defendant's own external solicitors.

**[13]** I note however from the list of attendance of the 57th Board of Directors Meeting held on 19 June 1993 that both the State Secretary and Director of Sabah Forestry were absent from the meeting held on 19 June 1993 when it was resolved to approve the award of the Extraction and Purchase Contract to the plaintiff in respect of compartments L5, L7, L10 and L11. Similarly both the said State Secretary and the Director of Sabah Forestry were again absent when the directors of the defendant met at the 58th Board of Directors Meeting held on 23rd July 1993 where it was resolved to approve the award of Extraction and Purchase Contract in respect of compartments L1, L2, L4, L7 and L8.

**[14]** The defence witness DW1 Alfred @ Jilolin bin Jingulam, then Acting Deputy General Manager (Forestry & Timber) said in his testimony that he understood that it was illegal to assign the contract to anyone to extract logs from the area. He did not however draw the attention of the board to the provisions of s. 24(6) of the Forest Enactment. As no one raised the question of illegality, he was silent about it. DW1 was in attendance at both meetings and so was the Company Secretary/Legal Adviser. No evidence was adduced in court that the Board of Director of the defendant was aware of the illegal provisions and despite that it went ahead with the execution of the agreement.

**[15]** Pursuant to the first and second agreements, the plaintiff had extracted and purchased 100,582.98 cubic meters of commercial timber logs at the purchase price of RM1,110,817.89 in respect of which the plaintiff had paid excess royalty in the sum of RM201,165.96 which sum the defendants are required to refund to the plaintiff but had failed to do so up till now.

**[16]** As a result of the repudiation of the first and second agreements and the revocation of the said power of attorney the plaintiff suffered loss and claimed against the defendant the following:

(a) Refund of excess royalty paid by the plaintiff in connection with the extraction/purchase of 100,582.98 cubic meters of commercial timber logs = RM201,165.96

(b) Loss of nett profit expected from the sale of merchantable timber logs to be purchased under the first and second agreements Estimated revenue from sale of 1,243,220 cubic meters logs = RM356,804,140

(c) Less: cost of purchasing the logs from the defendant (RM143.50 per cubic meter) plus royalties (RM40 per cubic meter)

= RM228,130.870

Loss of nett profit = RM128,673,270

**[17]** The plaintiff further prayed from this court for:

(a) a declaration that the termination of the first and second agreements and the revocation of the said power of attorney by the defendant pursuant to their solicitor's letter dated 22 August 1994 was wrongful and invalid;

(b) a declaration that the first and second agreements and the said power of attorney are still valid and subsisting;

(c) an order for specific performance by the defendant of the first and second agreements;

(d) alternatively, damages in the sum of RM128,874,435 or damages to be assessed for breach and repudiation of the first and second agreements and for the wrongful revocation of the said power of attorney;

(e) statutory interest on the sums adjudged at the rate of 8% per annum from the date of judgment to the date of full payment;

(f) reimbursement of legal costs on a full solicitor and client indemnity basis; and

(g) any other just or better relief that this Honourable Court deems fit to grant.

**Agreed Issues**

**[18]** At the hearing the parties agreed that three issues need to be determined by this court and these are as follows:

(1) Are the agreement for the extraction and purchasing of timber dated 28 June 1993, the agreement for the extraction and purchasing of timber dated 13 August 1993 and the power of attorney dated 22 September 1993 (collectively referred to as "the impugned transactions") void *ab initio* on the grounds of illegality;

(2) If the impugned transactions are valid, was the termination of the impugned transactions by the defendant pursuant to their solicitors' letter dated 22 August 1994 wrongful and invalid;

(3) If the impugned transactions are void *ab initio*, does s. 66 of the Contracts Act 1950 apply?

**Illegality And Severance Of Illegal Part Of Contract**

**[19]** Learned counsel for the plaintiff argued the real test to determine illegality is laid down in the Federal Court case of *Sababumi (Sandakan) Sdn. Bhd. v. Datuk Yap Pak Leong* [1998] 3 CLJ 503 where Peh Swee Chin FCJ opined that:

> To decide if s. 24(a) (of the Contracts Act 1950) makes a contract illegal and unenforceable in connection with a statute, and this bears repeating, one must find out first if the statute prohibits or forbids the act which the parties have contracted to do by the contract in question, and **not** whether the statute prohibits the contract or the making of the contract in question by the parties. This difference is real, though very subtle. In my view, the failure to bear in mind this fine distinction has given rise to some difficulties. (emphasis added)

**[20]** The attention of this court is drawn to the factual consideration of the agreements, which learned counsel said as two distinct acts. Firstly the act of requiring the plaintiff to extract the logs and secondly the act requiring the plaintiff to purchase the logs. Although it has been conceded by the plaintiff that the act to extract the logs is illegal, it was argued that the sale and purchase part of the contract is not tainted with illegality.

**[21]** Section 24(6) of the Sabah Forest Enactment 1968 says:

> A licence shall be personal to the holder thereof and **shall not be transferable in any manner whatsoever,** and shall ceased to be valid on the death of such holder or if such holder is declared to be insolvent under the provisions of any written law.

**[22]** In essence, learned counsel for the plaintiff argued that a timber licence is not transferable and it is personal to holder. But it is his contention that the word 'transferable' or assignment of a timber licence must mean: what are the acts envisaged in the timber licence that the licence is transferring? For that we need to examine the licence itself. The licence at encl. 31, pp. 5-6 contains the following clause:

> In consideration of the due fulfillment by the Licensee of the terms and conditions of this Licence the Director for an on behalf of the Government of the State of Sabah under authority vested by law hereby authorizes the Licensee subject to the conditions, limitations and restrictions for all purposes to the provisions of the Forest Enactment, 1968 and Forest Rules, 1969 **to fell, convert and extract timber within the specified licence area, for the period and with the expression as defined hereunder** (emphasis added).

**[23]** These are critical words, argued learned counsel, as what s. 24(6) of the Forest Enactment 1968 purports to forbid or prohibit is for the licensee to transfer those three acts, ie, to fell, convert and extract, in relation to the concession area. Therefore learned counsel argued that applying *'Sababumi'* test, the question to be asked is, would s. 24(6) of the Forest Enactment 1968 prohibit the act of selling and buying logs within the concession area? Learned counsel argued that the answer would be 'no' because the timber licence does not envisage the act of selling and purchasing of logs.

**[24]** At this juncture, counsel suggests that judicial notice could be had on the fact that a licensee who has been granted a timber licence can extract the logs and thereafter he sells the logs. Indeed logs are extracted for the purpose of their subsequent sale.

**[25]** Learned counsel further referred to the Federal Court case *Asia Television Ltd & Anor v. Viwa Video Sdn. Bhd & Connected Cases* [1984] 2 CLJ 80; [1984] 1 CLJ (Rep) 72 where Abdoolcader FJ succinctly said:

> The correlation between the two legislative enactments must in our view depend on whether there is a nexus between them ... such a nexus is a necessary prerequisite and that the burden is on the respondents to establish this as between the two Acts. In *Curragh Investments Ltd v. Cook* [1974] 1 WLR 1559 it was held that for a contract to be illegal as being made in contravention of some statutory provision there had to be a sufficient nexus between the statutory requirement and the contract, and that where statutory requirements were not linked sufficiently, or at all, to the contract no question of its illegality arose.

**[26]** Learned counsel for the plaintiff submitted that there is no nexus between selling of logs and s. 24(6) of the Sabah Forest Enactment 1968. Since the decision of *Sababumi (Sandakan) Sdn. Bhd. v. Datuk Yap Pak Leong and Asia Television Ltd & Anor v. Viwa Video Sdn. Bhd.* are the decisions of the Federal Court, they prevail and are binding on this court.

**Issue Of Severance**

**[27]** It is the submission of the Mr. Sugumar Balakrishnan, learned counsel for the plaintiff that since there are two contracts in one, the extraction part is illegal, the sale and purchase is not tainted with illegality. The question is can we sever the extraction and sale within the same agreement?

**[28]** Learned counsel for the plaintiff introduced to this court the authority of *Murugesan v. Krishnasamy & Anor* [1958] 24 MLJ 92, where Thomson CJ said at p. 93 that: "It is well settled law that if several distinct promises are made for one and the same lawful consideration and one or more of these promises is such as the law will not enforce that will not of itself prevent the rest from being enforceable.

**[29]** The point was thus put by Willes J, in the case of *Pickering and another v. The Ilfracombe Railway Co*. LR 3 CP 235, 250:

> The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good.

**[30]** It was put slightly otherwise by Mr. Leigh in the case of *The Bank of Australasia v. Thomas Chaplin Breillat* 6 Moore PC 152, 201:

> It has always been held that, when there are contained in the same instrument distinct engagements by which a party binds himself to do certain acts, some of which are legal, and some illegal, at common law, the performance of those which are legal may be enforced though the performance of those which are illegal cannot.

**[31]** The matter is dealt with in somewhat greater detail by Salter J, in the case of *Putsman v. Taylor* [1927] 1 KB 637, 639, 640 where he said:

> If a promisee claims the enforcement of a promise, and the promise is a valid promise and supported by consideration, the Court will enforce the promise, notwithstanding the fact that the promisor has made other promises, supported by the same consideration, which are void, and has included the valid and invalid promises in one document. But if the promise sought to be enforced is invalid, as being in undue restraint of trade or for any other reason, the court will not invent a valid promise by the deletion, alteration, or addition of words and thus enforce a promise which the promisor might well have made, but did not make. The promise to be enforceable must be on the face of the document a separate promise, a separate compact, the subject of separate consideration and accord, the performance of which is independent of the performance of any other promises which the promisor may have made. If the promise is a separate promise and valid, the court will enforce it. Whether it is separate or not depends on the language of the document. Severance, as it seems to me, is the act of the parties, and not of the Court.

**[32]** The latest discussion on the point is to be found in the case of *Bennett v. Bennett* [1952] 1 All ER 413, 421 where denning LJ, said:

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> If the void covenant goes only to part of the consideration, so that it can be ignored and yet leave the rest of the deed a reasonable arrangement between the parties, then the deed stands and can be enforced in every respect save in regard to the void covenant.

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**[33]** In another case *Fielding and Plan Ltd. v. Najjar* [1969] 2 All ER 150 at 153, Lord Denning said:

> There is another point: even if there was a term and that these goods should be invoiced falsely in order to deceive the Lebanese
C authorities, I do not think it would render the whole contract void. That term would be void for illegality. But it can clearly be severed from the rest of the contract. It can be rejected, leaving the rest of the contract good and enforceable. The plaintiffs would be entitled, despite the illegal term, to deliver the goods f.o.b. English port, and send a true and accurate invoice to the Lebanese
D buyer. The Lebanese buyer could not refuse the goods by saying "I stipulated for a false invoice". He could not rely on his own iniquity so as to refuse payment. In my opinion the defence of illegality is clearly bad.

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**[34]** Learned counsel submits that upon looking at the Sabah Forest Enactment 1968, the contract document and even the title of the contract which is the Agreement for the Extraction and the Purchasing of Timber, the sale itself is included in the contract proper, ie, cl. 1(a). It is distinct from the extraction aspect.

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**[35]** It was argued further that s. 58 of the Contracts Act 1950 allows for illegal contract to be severed from the legal part of the contract when it says that:

> Where persons reciprocally promise, firstly, to do certain things
G which are legal, and secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

**[36]** As such, learned counsel for the plaintiff argued that severance need not be a remedy to be included in the prayer.
H Since it is an equitable remedy it is for the court to do so. Further the plaintiff, he argued, has also prayed for the necessary declaration for the 1st and 2nd agreements as being valid and subsisting and at prayer (g) of the statement of claim it contains the prayer where the court comes into the picture to grant the
I necessary relief as deems fit to grant.

**[37]** Relying on the authority of *Lim Eng Kay v. Jaafar bin Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190 learned counsel reiterated that the clause: "Any other relief which this Honourable court deems fit to grant" found in the prayer of the plaintiff's writ must not be treated as a mere ornament to pleadings devoid of any meaning. In *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 Gopal Sri Ram JCA said that such prayer would allow the court to award such relief as is appropriate in the circumstances of the case. Therefore it is submitted that such clause is adequate for the purpose of the plaintiff.

**Section 66 Contracts Act 1950**

**[38]** With regards to s. 66 of the Contracts Act 1950, learned counsel for the plaintiff submitted that it prevents the defendant from 'running away' from its responsibility and it confers the court to grant discretionary remedy in the nature of restitution within the ambit of the section and within the principles of the law of contract. This court's attention was brought to the case of *Badiaddin bin Mohd Mahidin v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 and another Federal Court case of *Ng Siew San v. Menaka* [1973] 2 MLJ 154 where it was decided that "the effect of s. 66 of the Contracts Act enables a person not in *pari delicto* to claim restoration since it is not based on an illegal contract but dissociated from it. That is permissible by reason of the section because the action is not founded on dealings which are contaminated by illegality. The party is only seeking to be restored to the *status quo* ante."

**[39]** Learned counsel for the plaintiff submitted that the plaintiff only discovered illegality upon receiving the defendant's letter dated 22 August 1994 and prior to this the plaintiff was not aware of its illegality. Therefore it was its submission that the plaintiff has satisfied the requirement of s. 66 of the Contract Act that which would entitle it to compensation.

**[40]** Other cases adduced by learned counsel for the plaintiff under this heading were *Menaka v. Lum Kum Chun* [1977] 1 MLJ 91 (Privy Council), *Ahmad bin Udoh & Anor v. Ng Aik Chong* [1970] 1 MLJ 82 (FC), *Yeep Mooi v. Chu Chin Hua & Ors* [1981] 1 MLJ 14; *Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings (Industrialised Buildings) Sdn. Bhd.* [1980] 1 MLJ 21 (FC); *Wong Yoon Chai v. Lee Ah Chin* [1981] 1 MLJ 219; *Apex Pharmacy*

*Holdings Sdn. Bhd. v. Chee Chin* [1984] 2 CLJ 266; [1984] 1 CLJ (Rep) 67 (FC) and *Lori (M) Bhd v. Arab-Malaysia Finance Bhd.* [1999] 2 CLJ 997.

**[41]** The plaintiff claims that it was not aware that the agreement was illegal. The plaintiff discovered it when encl. 29 was received, see para. 2 of pp. 77 and 78 thereof. The relevant part of the letter from Messrs Jayasuriya Kah & Co addressed to the plaintiff said as follows:

> SFI's attention has been drawn by the Forestry Department that the aforesaid agreements and arrangements which SFI had entered into with you contravened section 24(6) of the Forest Enactment, 1968 which **expressly provides that the licence issues to sfi by the director of forestry shall not be transferable in any manner whatsoever**. As a result of the said contravention the aforesaid agreements are rendered illegal and of no legal effect. (emphasis is added).

**[42]** The plaintiff therefore contends that the requirement of s. 66 had therefore been duly satisfied in that firstly the illegality was discovered after the two agreements were executed, secondly the plaintiff was not aware of the illegality and thirdly if anyone should have been aware of the illegality, it is the defendant which is 100% owned by the Government with its Directors comprising of very senior civil servants including the Director of Forestry. It was also contended that the legal adviser was present during the meeting and both agreements were prepared by the defendant's own external solicitors. As such the plaintiff is the innocent party and is entitled to invoke s. 66 of the Contracts Act. Learned counsel for the plaintiff adduced another authority to support his contention, see *Tan Lai v. Mohamed bin Mahmud & Ors* [1982] CLJ 201; [1982] CLJ (Rep) 800.

**[43]** Learned counsel for the plaintiff in conclusion summarised his submission by saying that on the authority of *Sababumi (Sandakan) Sdn. Bhd. v. Datuk Yap Pak Leong* [1998] 3 CLJ 503 and *Asia Television Ltd & Anor v. Viwa Video Sdn. Bhd.* [1984] 2 CLJ 80; [1984] 1 CLJ (Rep) 72, the sale and purchase contracts are valid. Secondly, in the alternative, that there can be severance of the illegal and legal. Thirdly, if this court is of the view that both contracts are illegal and void, then s. 66 of the Contracts Act applies and there should be an assessment.

## Analysis Of The Plaintiff's Claim And Submission

**[44]** Let me begin with what our Contracts Act 1950 considers as lawful consideration or object of an agreement. The statute provides that the considerations or objects referred to in ss. 24(a), (b) and (e) shall be unlawful. This is an explicit statutory injunction that if an agreement is forbidden by law or prohibited by law or of such nature that, if permitted, it would defeat any law, that agreement is unlawful and void. Section 24(e) of the Contracts Act on the other hand provides that where the court considers an agreement to be immoral or opposed to public policy, such agreement is unlawful and void. The learned Gopal Sri Ram JCA in *Fusing Construction Sdn Bhd v. EON Finance Bhd* [2000] 3 CLJ 341 has said in no uncertain term that in Malaysia s. 24 of the Contracts Act 1950 squarely governed the principles of illegality of agreements.

**[45]** It can be seen in this instant case, the plaintiff is relying on the illegality of the transaction to establish their claim for declaratory relief and specific performance. As I have indicated earlier in the midst of the trial, the plaintiff applied for and leave was duly granted to amend its reply and defence to counterclaim to plead the severance of the first and second agreements.

## Doctrine Of Severance Of Contract

**[46]** Lord Sterndale MR in *Attwood v. Lament* [1920] 3 KB 571 (CA) at p 579 said that it is necessary to examine the meaning of the agreement as unsevered in order to see whether the parts are independent of one another and then to see whether "the severance alters the original meaning and effect of the agreement or only limits the sphere of its operation." Younger LJ in the same case said that "the doctrine of severance has not gone further than to make it permissible in a case where the covenant is not really a single covenant but is in effect a combination of several distinct covenants." (at p 593). Where the agreement as a whole is invalid severance generally should not be allowed.

**[47]** Lord Brightman in *Carney v. Herbert* [1985] 1 All ER 438 (Privy Council) at p. 442 said the question of severality are often difficult. There are no set rules which will decide all cases. To some extent each case must depend on its own circumstances and in particular on the nature of the illegality.

**[48]** *Pollock & Mulla On Indian Contract And Specific Relief Acts*, 11th edn pp 389-390 said that: "The general rule is that 'where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by common law, you may reject the bad part and retain the good. Two underlying principles appear to have guided the courts on the application of the doctrine of severance:

(i) The courts will not make a new contract for the parties by rewriting the existing contract or by basically altering its nature;

(ii) The courts will not sever the unenforceable parts of a contract unless it accords with policy to do so

**[49]** *Chitty On Contracts*, 27th edn, vol.1 said at p 882 that: "Many of the old authorities laid down that if a contract was made on several considerations, one of which is illegal, the whole contract was unenforceable and severance was impossible. Such a test is unworkable ... The true test under this head is therefore whether the illegal promise is substantially the whole or main consideration for the promise now sought to be enforced. If it is, then the court will not sever it ..."

**[50]** The second limitation on the court's power to sever the bad from the good is that they will not do so unless this accords with public policy. Section 25 of the Contracts Act 1950 stipulates that "if any part of a single consideration for one or more objects, or any one or any part of one of several considerations for a single object, is unlawful, the agreement is void."

**[51]** In *Lo Su Tsoon Timber Depot v. Southern Estate Sdn. Bhd. (supra)*, the Federal Court held that the clause which includes the provision comprising the promise to buy timber is not severable from the illegal consideration. This decision was referred to in the decision of Abdull Hamid Embong PK (as he then was) in *Kilang Papan Kuala Kangsar v. Koperasi Serbaguna Bekas-Bekas Polis Perak Bhd* [1995] 3 CLJ 697 where his Lordship refused to separate the agreement into valid clauses and invalid clauses.

**[52]** The law is clear that where the consideration for a promise or promises contained in a contract is unlawful, the whole agreement is void. The reason is that it is impossible to

discriminate between the weight to be given to different parts of the consideration. In the instant case the consideration is for the extraction and the purchase of logs.

**[53]** In *Murugesan v. Krishnansamy & Anor* [1958] 24 MLJ 92 Thomson CJ said at p. 93 that: "The consideration of an agreement is unlawful if it is of such a nature that if permitted it would defeat the provision of any law and where the consideration is unlawful the agreement is void. Moreover, if any part of any one of several considerations for a single object is unlawful agreement as a whole is void."

**[54]** Based on the above cases, since the sale portion of the first and second agreements in this instant case is tainted by the illegal extraction portion of the agreement, the whole transaction is tainted with illegality.

**Section 66 Of The Contracts Act 1950**

**[55]** I will now examine the issue as to whether s. 66 applies in the event that the first and second agreements are void *ab initio*.

**[56]** In *Chin Yin Foh v. Superwood Sawmill (S) Sdn Bhd* [1999] 1 LNS 15 Richard Malanjum J (as he then was) said: "As to the application of s. 66 of the Act I do not think it has any. There is no question of illegality being discovered or the contract becoming void. A solicitor (DW2) was involved in the preparation of the documents for the plaintiff and eight others. In fact the parties were in *pari delicto*. And on that point this is what his Lordship Gopal Sri Ram JCA has to say in the case of *Mustafa bin Osman v. Lee Chua & Anor* [1996] 3 CLJ 494 at p. 500:

> It cannot be doubted for a moment that the parties in the present case were in *pari delicto* when they entered into the illegal tenancy agreement. After all, the tenancy agreement was prepared by a solicitor. This is, therefore, not a case where the contract may be said to be discovered to be void under s. 66 of the Contracts Act 1950. See *Son Eng Keng v. Lim Chin Wah* [1979] 2 MLJ 91.

**[57]** In this instant case, the first and second agreements were also prepared by a solicitor. In *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229 Chang Min Tat FJ said ignorance of the law is no excuse. The plaintiff in this instant case cannot claim that it did not know that the first and second agreements and the said power of attorney are illegal.

**[58]** In *Mustafa bin Osman v. Lee Chua & Anor* [1996] 3 CLJ 494, his Lordship Gopal Sri Ram JCA said at p. 498 that:

> We accept as beyond argument that the illegality need not be specifically pleaded, and that once the illegality is brought to the attention of the court before whom the action is being tried, the court, upon being satisfied that the transaction is indeed illegal, is obliged to act upon it. See, *Natha Singh v. Syed Abdul Rahman & Anor* [1962] 2 MLJ 265; *Nasib Singh v. Ramasamy* [1969] 1 MLJ 211.

**[59]** The Court of Appeal held further that the *maxim ex turpi causa non oritur actio* (No action arises out of a disgraceful (illegal) matter) applies with full vigour.

**Matters Conceded To By Plaintiff**

**[60]** It is proper to mention here that the plaintiff though its counsel has conceded on two major areas namely:

(1) that the Extraction portion of the first and second agreements are illegal; and

(2) that the said power of attorney is illegal.

**[61]** Learned counsel for the plaintiff however argued that the sale and purchase part of the agreement is not tainted with illegality.

**[62]** With the concessions made, immediately two of the main prayers in the statement of claim dated 6 May 1997 can no longer be sustained and these are prayers:

(b) a declaration that the first agreement and the second agreements and the said power of attorney are still valid and subsisting;

and

(c) an order for specific performance by the defendant of the first agreement and the second agreements.

**[63]** While learned counsel for the plaintiff quoted the Federal Court cases of *Sababumi (Sandakan) Sdn. Bhd. v. Datuk Yap Pak Leong (supra)* and *Asia Television Ltd. & Anor v. Viwa Video Sdn. Bhd. (supra)* as his main authority, I am more inclined to think that the Federal Court decisions in *Lo Su Tsoon Timber Depot v. Southern Estate Sdn. Bhd.* [1971] 2 MLJ 161, *Sundang Timber Co.*

*Sdn. Bhd v. Kinabatangan Development Co. Sdn. Bhd.* [1977] 2 MLJ 200 and the High Court decisions in *Cynsan Development Sdn Bhd. v. Majunis Tumpi & Ors* [1997] 3 CLJ 396 and *Chu Yin Foh v. Superwood Sawmill (S) Sdn. Bhd* [1999] 1 LNS 15 are more appropriate and applicable as firstly these cases relate to similar situations in Sabah and secondly they relate to the interpretation of s. 24(6) of the Sabah Forest Enactment 1968.

**[64]** The words found in s. 24(6) of the Sabah Forest Enactment, ie, "personal to holder and shall not be transferable in any manner whatsoever" according to Ismail Khan CJ (Borneo), in *Lo Su Tsoon*'s case "are wide enough to include any form of assignment however disguised." (at p. 164). Therefore any agreement which is in breach of s. 24(6) of the Forest Enactment 1968 is illegal and any claim based thereon will not be enforced. This is crystal clear and requires no further explanation.

**[65]** In 1977 a similar case came up before the Federal Court where Lee Hun Hoe CJ Borneo said in *Sundang Timber Co. Sdn. Bhd. v. Kinabatangan Development Co. Sdn. Bhd. (supra)* at p. 203 as follows:

> In the case under appeal the agreement and the power of attorney must be read together as they are interrelated. By these two documents appellants had unreservedly assigned all their rights in the special licence to respondents. The appellants had nothing more to do with the licence but was merely sitting back to collect his dues as agreed for parting with their rights under the licence. They had parted with all their interests in the licence for financial consideration. In effect, they had transferred their rights in the licence to appellants. In my view the agreement is clearly illegal, being in breach of section 24(6) of the Enactment. Consequently, any claim based thereon cannot succeed as it would be tainted with illegality.

**[66]** These decisions of the Federal Court were followed by his Lordship Richard Malanjum J (as he then was) in *Cynsan Development Sdn. Bhd. v. Majunis Tumpi & Ors (supra)* and *Chu Yin Foh v. Superwood Sawmill (S) Sdn Bhd. (supra)*.

**[67]** In this instant case, upon examining the first and second agreements and the said power of attorney and upon perusal of the testimony given in open court by PW1 Mr. Tan Ten How, the Manager and Director of UNP Plywood Sdn. Bhd. (the plaintiff) said that their intention was to "take over the operation" from the defendant where the plaintiff would mobilize equipment

A and extract the logs. These logs were meant to supply the plaintiff's plywood mill. PW1 further testified that the two agreements were in the nature of "timber charge" contracts. There is also uncontroverted evidence of DW1 that the term "timber charge" is a special arrangement whereby the contractor is allotted
B an area to log and whatever log extracted from the area they can sell themselves and they pay the defendant the fixed agreed sum per cubic meter. DW1 confirmed that the two agreements fell under this category because the plaintiff had the right to log and sell the timber and all they need to do is pay the agreed sum to
C the defendant. As such based on the testimony and from analysing the contents of the two agreements the irresistible conclusion is that upon their execution the defendant had to do nothing but collect the money due in the manner agreed whereby for a volume of log per cubic meter the plaintiff will have to pay a nett sum of
D RM75 per cubic meters for Millable Quality (MQ) grade and up and a nett sum of RM40 per cubic meters for Low Quality (LQ). Processing, royalty, logging costs and all other related costs including construction and maintenance of roads, bridges and culverts would be the responsibility of the plaintiff.

E

**[68]** Upon examining the first and second agreements and the said power of attorney and all other documents filed, there is overwhelming evidence and therefore it is my finding that the defendant has given all its rights to extract and harvest and sale
F of timber to the plaintiff upon payment of the agreed dues. All the defendant need to do is nothing more than merely to collect all the payments due and payable by the plaintiff as stipulated in the agreement.

G **[69]** Learned counsel for the plaintiff argued that there are two separate parts of these so called "Agreements for the extraction and purchasing of timber". One part, it was argued being the extraction part and the other part being the selling aspect. Let us examine the first and second agreements which the parties hereto
H agreed as identical.

**[70]** Clause 1(a) stipulates:

> The company (defendant) engages the contractor (plaintiff) and the contractor accepts the engagement to **extract**, and the
I company agrees to **purchase** commercial timber logs from the said area under the terms and conditions hereinafter provided ... (emphasis added).

**[71]** Clause 2 stipulates:

> The contractor shall at his expense fell, cut, debark and deliver the timber logs and/or pulpwood and fuelwood to the company (sic) logpond and/or woodyard as directed by the company. No timber shall be removed otherwise than to such logpond and/or wood yard as designated by the company (hereinafter referred to as "the said logyard") and it shall remain the property of the company until disposed of in accordance with clause 17 hereof.

**[72]** It means simply that the plaintiff shall, at its own expense fell, cut, debark and deliver the timber logs to the defendant's logpond or logyard until they are disposed off in accordance with cl. 17.

**[73]** Clause 17(1) provides:

> Before the contractor takes possession of any of the company's timber logs at the said logyard, the contractor shall pay the price in full calculated at the rates under clause 13 hereof. The contractor shall pay the royalty of the logs before they are removed and taken over by the contractor. Such payment can be made to the company either by cash or by bank draft.

**[74]** Essentially it means that the plaintiff will only take possession of the very same logs duly delivered to the defendant's logpond or logyard by the plaintiff after the full price calculated in accordance with the agreed rates under cl. 13.

**[75]** Clause 13 deals with the rate of payment and it provides:

> 13(1) The Contractor shall pay the company a flat rate of Ringgit Malaysia seventy five (RM75.00) only per cubic metre true measure of all commercial timber logs produced from the said area which are of millable quality (MQ) grade and up for all regular species of timber, and Ringgit Malaysia Forty (RM40,00) only per cubic metre true measure for all low grade (LG), small (SM), and other timbers (OT) measured and graded at the said logyard. The definitions of small (5M), low grade (LG) and millable quality (MQ) grades are respectively given in Appendix II which is herein attached.

**[76]** It is obvious from the above that the defendant has surrendered all their rights to the extraction and sale of timber to the plaintiff. The plaintiff fell, cuts, debarks and extract the timber and deliver them to the logpond or the logyard. Then, the plaintiff will pay the defendant the agreed rate and will take possession of the timber found in the logpond or the logyard. The defendant

need not lift a finger to do anything but merely to collect the money. This view is further fortified when one examines the words used in the irrevocable powers of attorney granted on 4 August 1993 and 22 September 1993 by the defendant to the plaintiff.

**[77]** Clause 1 of both of the said power of attorney (agreed by parties as identical) allows the plaintiff:

> To enter the said Land (the concession area) to *manage and superintendent the extraction and sale of timber therefrom and to enter into contracts and arrangements of all kinds in relations thereto.* (emphasis added)

**[78]** Clause 6 provides:

> To sign and execute contracts with third party or company or otherwise in the said Attorney's **absolute discretion for the extraction and sale of the timber from the said land.** (emphasis added)

**[79]** The said power of attorney is irrevocable and read together with the first and second agreements effectively assigned the rights of the defendant under the licence to the plaintiff.

**[80]** Contrary to the contention of learned counsel for the plaintiff and it is obvious from what has been outlined earlier, the extraction and sale of the timber within the concession areas of the defendant are inextricably linked and cannot be detached from each other. There is nothing for the plaintiff to purchase from the defendant if the plaintiff does not extract the timber first from the said area. It is my finding that the extraction and sale are part and parcel of the same transaction. Clause 1(a) of the first and second agreements on its true construction contemplates a composite act and not two distinct separate acts. It envisages reciprocal obligations to be performed, one to extract, which is to be done exclusively by the plaintiff, and the other, which is the passive act for the defendant, to sell the logs to the plaintiff after the extraction of timber has been performed by the plaintiff. I cannot therefore accept the argument by learned counsel for the plaintiff that the extraction part and the purchase part are two separate transactions.

**[81]** Based on the above, it is my finding that the 'sale' part is not severable from the extraction part of the first and second agreements. The end result is that the defendant had effectively transferred its rights in the licence to the plaintiff. Indeed, the first

and second agreements and the said power of attorney read together amounted to an attempt to circumvent the conditions of the issuance of the licence as to its non-transferability in any manner whatsoever to the plaintiff who is a non-licensee. Clearly this is illegal and contrary to s. 24(6) of the Forest Enactment.

**[82]** Responding to the three issues for the determination of the court, the answers are as follows:

**[83]** To issue No. 1: Are the agreement for the extraction and purchasing of timber dated 28 June 1993, the agreement for the extraction and purchasing of timber dated 13 August 1993 and the power of attorney dated 22 September 1993 (collectively referred to as "the impugned transactions") void *ab initio* on the grounds of illegality: the answer is Yes;

**[84]** On issue No. 2: If the impugned transactions are valid, was the termination of the impugned transactions by the defendant pursuant to their solicitors' letter dated 22 August 1994 wrongful and invalid: This becomes a non-issue in view of the answer to issue No. 1;

**[85]** On issue No. 3: If the impugned transactions are void *ab initio*, does s. 66 of the Contracts Act 1950 apply? The answer is No.

**[86]** The plaintiff failed, on the balance of probability, to make out a case against the defendant and as such the plaintiff's claim is accordingly dismissed with costs to be taxed if not agreed.